**HONG LEONG FINANCE BHD**

**v.**

**STAGHORN SDN BHD & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
ARIFIN ZAKARIA JCA
MOHD GHAZALI YUSOFF JCA
JAMES FOONG J
[CIVIL APPEAL NOS: B-02-132-1995,
B-08-183-1995, B-02-138-1995 & B-02-228-1995]
25 OCTOBER 2004

***LAND LAW:*** *Lien - Creation - Deposit of land title with financier - Whether only registered proprietor entitled to deposit title - National Land Code, s. 281(1), (2)*

***CIVIL PROCEDURE:*** *Functus officio - Application for leave to intervene in action for order for sale of land - Application made after order for sale granted, public auction successfully completed and certificate of sale issued by court - Whether court functus officio - Rules of the High Court 1980, O. 15 r. 6*

***CIVIL PROCEDURE:*** *Judgments and orders - Setting aside of order regularly obtained - Whether on appeal only - Whether exceptions apply when statutory requirements contravened - Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd*

Hong Leong Finance Berhad ('HL') obtained an order for sale of a piece of land (the 'land') under O. 83 of the Rules of the High Court 1980 ('RHC') based on a lien holder's caveat under s. 281 of the National Land Code ('NLC'). The land was sold to a successful bidder who paid the full purchase price and a certificate of sale was issued in accordance with s. 259(3)(a) NLC. One Staghorn Sdn Bhd ('Staghorn') then filed an application to intervene and to set aside the order for sale and other consequential orders. The High Court granted the application with other substantive reliefs. The plaintiff appealed against the intervention order and the Court of Appeal allowed the appeal on the ground that the High Court had no jurisdiction to grant the said order as the proceedings had come to an end upon the issuance of the certificate of sale of the land. Further, there was no stage of proceedings in existence as

required by O. 15 r. 6(2) RHC. Dissatisfied with this outcome, Staghorn appealed to the Federal Court. The Federal Court set aside the order of the Court of Appeal and ordered the case to be reverted to this court to hear all issues of the appeal except on the jurisdiction of the court under O. 15 r. 6 RHC.

**Held (affirming orders of learned judge in part)**
**Per James Foong J delivering the judgment of the court:**

**[1]** The plaintiff challenged the right of Staghorn to apply for intervention when the order of sale was granted, the public auction successfully completed and the certificate of sale issued by the High Court. The High Court was *functus officio* in hearing the application. The sanction by the Federal Court did not prevent this court from dealing with the issue of *functus officio*. (p 14 d-g)

**[2]** A final order regularly obtained cannot be set aside except on appeal unless the exceptions in *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd* are applicable. In the present case, the mandatory requirement for the creation of the lien holder's caveat was not complied with. The registered proprietors did not borrow from the plaintiff and neither did they or their solicitors deposit the document of title with the plaintiff. When there was default in the repayment of the said loan, judgment against the borrower was obtained instead of the registered proprietors. All these contravened the statutory requirements of s. 281(1) and (2) NLC. (pp 15 d-h & 16 a-d)

**[3]** It is material in the creation of a lien holder's caveat under s. 281 NLC to have the registered proprietor deposit the document of title with the lender. This is because it is the registered proprietor who intends to surrender his rights to the lender to deal with the said land in the event of default in repayment of the loan that he obtained from the lender. As a borrower, no other person can substitute the registered proprietor in performing this task of depositing the document of title with the lender for the creation of this statutory instrument. To allow this would defeat the concept of the right of the registered proprietor to deal with his own land. (p 17 b-c)

**[4]** Section 281 is intended for a registered proprietor to raise money on loan, speedily, by depositing the document of title registered in his name with the lender as compared to the more complex process of registering a legal charge over the land. It is only available to a registered proprietor who borrows money and deposits his title with the lender. It does not extend

to a beneficial owner who is yet to become a registered proprietor. Since this facility is only available to the registered proprietor, in the event of default in repayment of the loan, judgment must be obtained against the registered proprietor as borrower. The wordings in s. 281(2) NLC "holder of any lien has obtained judgment for the amount due to him" is clear to this effect for there can be no one else other than the registered proprietor who is the borrower. (p 17 d-e)

**[5]** The registered proprietors did not borrow any money from the plaintiff nor did they deposit the document of title with the plaintiff, and neither did the plaintiff obtain judgment on the amount due under the loan against them. There was non-compliance of the rules and procedure in the creation of the lien holder's caveat and the fulfilment of the pre-condition for enforcement of the remedy following the failure in repayment of the loan. Therefore, the order for sale made pursuant to s. 281(2) NLC was tainted with illegality. (p 17 g)

**[6]** When the substantive law is breached the court is permitted to depart from the *functus officio* concept laid down in *Mui Bank Bhd v. Cheam Kim Yu* and set aside *ex debito justitiae* the order for sale under the rule expressed in *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd*. With these, Staghorn had a right to apply to intervene. The learned judge was correct in allowing Staghorn to intervene since Staghorn was claiming that its rights would be affected by any judgment in the proceeding of this case and that it should not be deprived of a chance to be heard. As advised by the Privy Council in the *Pegang Mining* case a "flexibility of approach" must be adopted. (p 18 a-b)

**[7]** Although the lien holder's caveat and the order for sale were invalid, the learned judge was incorrect in ordering the handing over of the document of title to Staghorn. The learned judge was also incorrect in declaring Staghorn as the "rightful true beneficial owner of the said land" and in instructing the document of title to be registered in its name. In fact, those orders were not even requested by Staghorn in its application. (p 18 d-e)

**[8]** There was no dispute that Staghorn paid 10% of the purchase price for the said land but it had nominated the 3rd defendant as the purchaser. The documentary evidence showed that Staghorn divested its rights and interest in the said land to the 3rd defendant, who, in turn, secured finances to pay off the balance of the purchase price to the registered proprietors. Consequently, the land was incumbered. Staghorn's demand for the return of the document of title was inequitable and without logic.

To register Staghorn as the registered proprietor was far fetched when evidence positively identified the 3rd defendant as the beneficial owner of the said land. Although the plaintiff was without security of a lien holder's caveat, the plaintiff was not without interest over the said land. This was because the loan granted to the 3rd defendant's nominee and the registration of a first legal charge over the said land awaited the 3rd defendant to be registered as a proprietor. (p 18 e-g)

**[9]** As for the successful bidder who purchased the land, his right to the said land was derived from the order for sale. Since that order was considered null and void, the sale to him must naturally be annulled and rendered void. He should be entitled to the return of his money paid at the auction. (p 18 h)

*[**Bahasa Malaysia** Translation Of Headnotes*

Hong Leong Finance Berhad ('HL') memperoleh perintah penjualan sebidang tanah ('tanah') di bawah A. 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') berasaskan kepada kaveat pemegang lien di bawah s. 261 Kanun Tanah Negara ('KTN'). Tanah telah dijual kepada pembida yang berjaya yang membayar sepenuhnya harga belian dan memperoleh sijil jualan di bawah s. 259(3) KTN. Berikutnya, sebuah syarikat, Staghorn Sdn Bhd ('Staghorn'), memfail permohonan untuk mencelah bagi mengenepikan perintah penjualan dan mendapat perintah-perintah lain. Mahkamah Tinggi membenarkan permohonan dan memberi perintah-perintah substantif lain. Plaintif merayu terhadap perintah pencelahan dan Mahkamah Rayuan membenarkan rayuan atas alasan bahawa Mahkamah Tinggi tidak berbidang kuasa untuk memberikan perintah tersebut kerana prosiding-prosiding telah pun berakhir sebaik sahaja sijil jualan dikeluarkan. Lagipun, tidak wujud tahap prosiding seperti yang dikehendaki A. 15 k. 6(2) KMT. Tidak berpuas hati dengan keputusan, Staghorn merayu ke Mahkamah Persekutuan. Mahkamah Persekutuan mengenepikan perintah Mahkamah Rayuan dan memerintahkan kes dikembalikan ke mahkamah tersebut untuk mendengar kesemua isu-isu rayuan kecuali soal bidang kuasa mahkamah di bawah A. 15 k. 6 KMT.

**Diputuskan (mengesahkan sebahagian perintah-perintah yang arif hakim) Oleh James Foong H menyampaikan penghakiman mahkamah:**

**[1]** Plaintif mencabar hak Staghorn untuk memohon untuk mencelah selepas perintah penjualan diberikan, lelongan awam selesai dan sijil jualan dikeluarkan oleh Mahkamah Tinggi. Mahkamah Tinggi jelas sudah *functus officio* untuk mendengar permohonan. Sanksi Mahkamah Persekutuan tidak menghalang mahkamah ini dari menangani isu *functus officio*.

**[2]** Suatu perintah muktamad yang diperoleh secara teratur tidak boleh diketepikan melainkan melalui rayuan kecuali jika pengecualian-pengecualian di dalam *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd* terpakai. Dalam kes semasa, syarat mandatori bagi pembentukan kaveat pemegang lien telah tidak dipenuhi. Pemilik berdaftar tidak meminjam dari plaintif dan mereka atau peguam mereka tidak juga menyimpan dokumen hakmilik dengan plaintif. Apabila wujud kemungkiran pembayaran balik pinjaman tersebut, penghakiman direkodkan terhadap peminjam tetapi tidak terhadap pemilik seperti sepatutnya. Semua ini menyalahi kehendak-kehendak statutori s. 281(1) dan (2) KTN.

**[3]** Dalam pembentukan sesuatu kaveat pemegang lien di bawah s. 281 KTN, adalah perlu bagi pemilik berdaftar untuk menyimpan dokumen hakmilik dengan pemberi pinjaman. Ini kerana pemilik berdaftarlah yang akan menyerahkan hak-haknya kepada pemberi pinjaman untuk berurusan dengan tanah tersebut jika berlaku kemungkiran dalam pembayaran balik pinjaman yang diperolehi dari pemberi pinjaman. Selaku peminjam, tidak seorang pun boleh mengganti pemilik berdaftar dalam melaksanakan tugas mendeposit dokumen hakmilik dengan pemberi pinjaman dalam pembentukan instrumen statutori ini. Membenarkannya bererti menidakkan konsep yang berkaitan dengan hak pemiklik berdaftar untuk menguruskan tanahnya sendiri.

**[4]** Seksen 281 bertujuan membolehkan seorang pemilik berdaftar untuk mendapatkan wang melalui pinjaman, secara cepat, dengan mendepositkan dokumen hakmilik atas namanya dengan pemberi pinjaman berbanding dengan proses mendaftar suatu gadaian berdaftar atas tanah yang lebih kompleks itu. Ia hanya terbuka kepada seorang pemilik berdaftar yang meminjam wang dan menyimpan hakmiliknya dengan pemberi pinjaman. Ia tidak terbuka kepada seorang pemilik benefisial yang belum lagi menjadi pemilik berdaftar. Oleh kerana kemudahan ini hanya terbuka kepada pemilik berdaftar, maka, jika berlaku kemungkiran dalam pembayaran balik pinjaman, penghakiman hendaklah diambil terhadap pemilik berdaftar sebagai peminjam. Perkataan-perkataan dalam s. 281(2) KTN bahawa seseorang "pemegang mana-mana lien yang memperoleh penghakiman atas jumlah yang terhutang kepadanya" jelas memberi kesan sedemikian kerana tiada orang lain lagi selain dari pemilik berdaftar yang menjadi peminjam.

**[5]** Pemilik-pemilik berdaftar tidak meminjam apa-apa wang dari plaintif dan tidak juga mendeposit sebarang dokumen hakmilik dengan plaintif dan plaintif sebaliknya tidak memperoleh apa-apa penghakiman terhadap mereka atas jumlah jumlah yang terhutang di bawah pinjaman. Terdapat ketidakpatuhan kaedah dan prosedur dalam pembentukan kaveat pemegang lien dan dalam memenuhi syarat pelaksanaan remedi akibat kegagalan membayar balik pinjaman. Oleh yang demikian, perintah penjualan yang dibuat di bawah s. 281(2) KTN telah dicacati oleh ketaksahan.

**[6]** Apabila undang-undang substantif dilanggar, mahkamah dibenarkan untuk menyimpang dari konsep *functus officio* seperti yang diputus dalam *Mui Bank Bhd v. Cheam Kim Yu* dan mengenepikan *ex debito justitiae* perintah penjualan berdasarkan kaedah yang diperkata dalam *Badiuddin Mohd Mahidin v. Arab Malaysian Finance Bhd*. Ini bererti Staghorn mempunyai hak untuk memohon untuk mencelah. Yang arif hakim betul apabila membenarkan Staghorn mencelah berdasarkan hujah Staghorn bahawa haknya akan terjejas oleh prosiding kes ini dan bahawa ia tidak seharusnya dihindar dari peluang untuk didengar. Seperti yang dinasihatkan oleh Majlis Privi dalam kes *Pegang Mining* "pendekatan yang berlentur" hendaklah dipakai.

**[7]** Walaupun kaveat pemegang lien dan perintah penjualan tidak sah, yang arif hakim silap dalam memerintahkan pemindahan dokumen hakmilik kepada Staghorn. Yang arif hakim juga silap dalam mengisytiharkan Staghorn sebagai "pemilik benefisial yang sebenar tanah tersebut" dan mengarahkan dokumen hakmilik didaftarkan atas namanya. Malah, perintah-perintah tersebut tidak pun diminta oleh Staghorn dalam permohonannya.

**[8]** Adalah tidak dipertikai bahawa Staghorn telah membayar 10% dari harga belian tanah tersebut tetapi mereke menamakan defendan ketiga sebagai pembeli. Keterangan dokumentari menunjukkan bahawa Staghorn telah menyalurkan hak-hak dan kepentingannya di dalam tanah tersebut kepada defendan ketiga, yang kemudian memperoleh biaya kewangan untuk membayar harga belian kepada pemilik berdaftar. Tanah tersebut, dengan itu, menjadi terhalang. Tuntutan Staghorn supaya dikembalikan dokumen hakmilik adalah tidak berekuiti dan tidak logik. Untuk mendaftarkan Staghorn sebagai pemilik berdaftar adalah mustahil apabila keterangan menunjukkan dengan jelas bahawa defendan ketiga adalah pemilik benefisial tanah tersebut. Walaupun plaintif tidak dijamin oleh sebarang kaveat pemegang lien, ia bukanlah tidak mempunyai kepentingan dalam

tanah tersebut. Ini kerana pinjaman yang diberikan kepada nomini defendan ketiga dan pendaftaran gadaian pertama ke atas tanah tersebut hanya menunggu defendan ketiga didaftarkan sebagai pemilik.

**[9]** Berhubung pembida yang berjaya yang membeli tanah, haknya kepada tanah adalah bersumberkan perintah penjualan. Oleh kerana perintah tersebut dianggap batal dan tak sah, penjualan kepadanya hendaklah juga dianggap sebagai terbatal dan tak sah. Apapun, pembida berhak mendapatkan kembali wang yang dibayar pada lelongan tersebut.

**Case(s) referred to:**

*Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis [1991] 2 CLJ 862; [1991] 1 CLJ 19 SC* ***(refd)***

*Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC* ***(refd)***

*Mui Bank Bhd v. Cheam Kim Yu [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 SC* ***(refd)***

*Palaniappa Chetty v. Dupire Brothers & Anor In the suit Palaniappa Chetty v. Ng Chin Pan [1922] 1 FMSLR 370* ***(refd)***

*Pegang Mining Co Ltd v. Choong Sam & Ors [1969] 2 MLJ 52* ***(refd)***

**Legislation referred to:**

National Land Code, ss. 259(3)(a), 281(1), (2)

Rules of the High Court 1980, O. 15 r. 6(2)(b), O. 83

*(Civil Appeal Nos: B02-132-95 & B08-183-95)*
*For the appellant - Yoong Sin Min (TY Ma with her)*
*For the respondent - Yusuf Khan Ghows Khan (KL Wong & SL Wee with him)*

*(Civil Appeal Nos: B02-138-95 & B02-228-95)*
*For the appellant - Joginder Singh*
*For the respondent - Yusuf Khan Ghows Khan (KL Wong & SL Wee with him)*

*[Appeal from High Court, Shah Alam; Originating Summons No: 24-391-90]*

*Reported by Usha Thiagarajah*

## JUDGMENT

**James Foong J:**

### Introduction And Background

There are four appeals before us. In order to appreciate the substance and form of these appeals it is necessary to understand the background of this case and the events that transpired.

a There is a piece of land held under CT 23316 for Lot 1996 in the Mukim of Semenyih, District of Ulu Langat, Selangor (the said land). The registered owners are the 1st and 2nd defendants.

On or about 27 February 1981, the 1st and 2nd defendants, as vendors, entered into a sale and purchase agreement with the 2nd Intending Intervenor – Staghorn Sdn Bhd (Staghorn) to sell the said land for a sum of RM3, 024,110.00. Staghorn paid RM302,411, representing 10% of the purchase price, to the vendors. The material directors of Staghorn then were one Annuar bin Datuk Eusoff and Set Kon Kim (Set).

c However, the sale was completed not by Staghorn. An associate company called Teck Lay Realty Sdn Bhd, the 3rd defendant, completed the purchase by paying the full balance of the purchase price and received from the vendors' solicitors the document of title to the said land and the memorandum of transfer duly executed by the vendors with the 3rd defendant signing as the transferee.

To finance the payment of the balance of the purchase price, the 3rd defendant secured a loan from Bank Bumiputra Malaysia Bhd (BBMB). But instead of favouring BBMB with a first legal charge over the said land, the document of title and the duly executed memorandum of transfer were handed over by the 3rd defendant or its solicitors to Hong Leong Bank Bhd, the plaintiff. This was to secure a 3rd party legal charge for facilities given by the plaintiff to another associate company of Staghorn called Park Avenue Homes Sdn Bhd (Park Avenue). This security was an additional security to some lands situated in Johore. Accompanying the document of title and the duly executed memorandum of transfer was a resolution by the 3rd defendant to charge the said land to the plaintiff. To further protect the plaintiff's interest, the 3rd defendant also executed a charge in escrow of the said land in favour of the plaintiff. As for BBMB, it was only able to protect its interest with a private caveat placed on the said land.

When the plaintiff attempted to register a first legal charge over the said land simultaneously with the transfer from the 1st and 2nd defendants to the 3rd defendant, it was prevented by the private caveat of BBMB.

To protect its legal interest before arrangement was made to remove BBMB's private caveat, the plaintiff registered a lien holder's caveat over the said land.

Then before the plaintiff could proceed to effect the necessary registration, Park Avenue failed in its obligation to repay the loan facilities, whereupon the plaintiff sued Park Avenue for the loan advanced, and obtained judgment against it. To enforce its security, the plaintiff applied to the High Court to foreclose on the said land under s. 281 of the National Land Code (NLC). This right is derived from the lien holder's caveat over the said land registered in the plaintiff's favour. Named as respondents in this foreclosure proceeding were: the 1st, 2nd and 3rd defendants. An order for sale (order for sale) of the said land was granted on 9 August 1991.

On 16 November 1991, at the public auction of the said land held in pursuant to the order for sale, the 1st intervener was the successful bidder. He paid the full purchase price and was issued a Certificate of Sale by the High Court on 18 February 1991.

Though successful, the 1st intervener was unable to effect the transfer of the said land to himself or his nominee due to the existence of two caveats: one by Set and the other by Staghorn, lodged on 21 January 1985 and 1 September 1992 respectively. By then, the caveat lodged by BBMB was withdrawn.

After 1 year 10 months from the date of the issuance of the Certificate of Sale, and two years after the successful auction, Staghorn applied to intervene in the foreclosure proceedings in the High Court. This application is listed as encl. 77. The prayers requested are *inter alia*:

(1) Staghorn be allowed to intervene.

(2) That the order for sale of the said land and the public auction in consequent thereof be set aside.

(3) That the grant of title to the said land currently held by the plaintiff be handed over to Staghorn.

The grounds proffered by Staghorn in support of this application are: Staghorn is actually the beneficial owner of the said land since it has paid 10% of the purchase price. Originally Staghorn intended to sell its beneficial interest in the said land to the 3rd defendant but this sale did not materialize. When this deal fell through, Staghorn claims that it continues to be its beneficial owner. Though admitting that Staghorn did not pay for the balance of the purchase price for the said land, Staghorn argues that the 3rd defendant has paid on its behalf under a sort of internal inter company arrangement "which has nothing to do with the parties in these proceedings".

The plaintiff rejected these assertions as preposterous. The plaintiff maintained that the 3rd defendant is the nominee of Staghorn and all contemporaneous documents point to this fact *viz:* the execution by the 3rd defendant as transferee on the memorandum of transfer; the resolution of the 3rd defendant, signed by no other than set himself, declaring the 3rd defendant has agreed to charge the said land in favour of the plaintiff; the creation of the charge in escrow in favour of the plaintiff; the acknowledgement by the 1st and 2nd defendants that the 3rd defendant has paid the full purchase price and various others.

On 30 January 1995 the learned judge of the High Court allowed the first prayer for Staghorn to intervene.

Then on 27 April 1995 the said judge granted a series of orders, some requested in encl. 77 but not others. We shall list them all in accordance with the order of the learned judge dated 27 April 1995:

(i) that the said order of sale and the sale by auction conducted on 16 November 1991 in respect of the said land be set aside;

(ii) that the plaintiff or any party in possession of the document of title to the said land do deliver the same to Staghorn within fourteen (14) days of this order;

(iii) Staghorn be declared the rightful true beneficial owner of the said land pursuant to the sale agreement dated 27 February 1981 between the registered proprietors and Staghorn;

(iv) all relevant registered or to be registered memorials in favour of the plaintiff *inter alia* Lien-Holder's Caveat No. 4556/81, the 1st intervenor, Wong Bin Chen @ Ng Chi Leong *inter alia* Caveat No. 23889/91 and all those who claim interest(s) under them or any one of them *inter alia* caveat of NadiVelita Sdn Bhd (nominee of the 1st intervenor) Presentation No. 3150/92 Volume 21 Folio 112, made in the register title and/or original issue document of title wherever they may appear be cancelled and thereby removed by the Registrar of Titles of State of Selangor, Shah Alam;

(v) the plaintiff whether by itself its agent(s) or by any other party(ies) who claim(s) interests under the plaintiff *inter alia* whether it be the 1st intervenor herein himself or by the said NadiVelita Sdn Bhd or otherwise whosoever or howsoever who/which may be having control over or custody of the original issue document of title of the said land do deliver up the same within fourteen (14) days upon service of this order, to the counsel for Staghorn Sdn Bhd;

(vi) the learned deputy registrar (Timbalan Pendaftar) of the High Court, Malaya as an officer of the court be hereby authorised and empowered forthwith to execute for and on behalf of the registered proprietors whether deceased or otherwise of the said land, State of Selangor, the memorandum of transfer and all other relevant or incidental documents therewith necessary to enable Staghorn to effect the registration of the transfer of the original issue document of title of the said land in favour of Staghorn;

(vii) the Registrar of Titles of the State of Selangor, Shah Alam do register the said memorandum of transfer as directed hereunder to be executed in favour of Staghorn;

(viii) the plaintiff, the 1st intervener whether by itself or themselves or by all those who claim interests under it/them *inter alia* NadiVelita Sdn Bhd or otherwise whosoever or howsoever be restrained from lodging any other or further caveat(s) or other memorials based on the same claim(s) as has been litigated hereunder over the said land hereafter; and

(ix) the costs of these proceedings be paid to the 2nd intervener by the plaintiff.

Dissatisfied with these decisions of the High Court, the plaintiff and the 1st intervener appealed to the Court of Appeal and these are registered as:

B02-132-1995 & B02-138-1995 being appeals by the plaintiff and the 1st intervener respectively against the decision of the High Court dated 30 January 1995 that allowed Staghorn to intervene.

B08-183-1995 & B02-228-1995 being appeals by the plaintiff and the 1st intervener respectively against the decision of the High Court dated 27 April 1995 that granted all the orders specified in the order of the judge dated 27 April 1995.

These four appeals were consolidated and heard by this court. On 15 June 1995, this court allowed the plaintiff's and the 1st intervener's appeal (see the reported judgment of this court in [1995] 2 MLJ 849).

Dissatisfied with this outcome, Staghorn appealed to the Federal Court. The Federal Court on 5 August 1997 set aside the order of the Court of Appeal of 15 June 1995 and ordered the case be reverted back to the Court of Appeal to hear all issues of the appeal "kecuali atas isu bidangkuasa di bawah A. 15 k. 6, Kaedah-Kaedah Mahkamah Tinggi 1980" (except those issues within O. 15 r. 6 of the Rules of High Court).

**What Is Before This Court?**

Having revealed the chequered history of this case, it is pertinent to ascertain, at the outset, the extent of the restriction placed upon this court by the Federal Court in rehearing this appeal. It is our perception that the only limitation imposed by the Federal Court relates to O. 15 r. 6 of the Rules of High Court (RHC) that arose from the decision by this court of 15 June 1995 that allowed the appeals of the plaintiff and 1st intervener. We are of the view that the relevant provision under reference must be O. 15 r. 6(2)(b) RHC which reads:

> At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> ...
>
> (b) Order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

When one examines the judgement of this court of 15 June 1995, the appeals were allowed solely on the issue of "whether there were any proceedings in existence in this originating summons (encl. 77) on 30 January 1995, when the order for intervention was made, or even on 4 December 1993 when the summons seeking intervention was issued". Towards this the learned judges of this court were of this opinion:

> We are of the view that after 18 February 1991, when the certificate of sale was issued by the registrar of the High Court, nothing further remained to be done in the proceedings. There were no proceedings in existence after that date. The court would have had no jurisdiction thereafter to make any order under O. 15 r. 6(2). The proceedings came to an end upon the issuance of the certificate of sale on the 18 February 1992, and *thereafter the order for intervention which was made on 30 January 1995, or the summons for leave to intervene which was filed on 4 December 1993, had not been made or issued*

> *'at any stage of the proceedings' as required by O. 15 r. 6(2).* This is because there was no stage in the proceedings in existence after the 18 February 1992 as the issuance of the certificate of sale pursuant to s. 259(3)(a) of the Code was the final stage of the proceedings for an order for sale under O. 83 (emphasis added – see [1995] 2 MLJ 849 @ para D).

On this, the Federal Court disagreed. Faced with this situation, we comprehend that the restriction placed upon us by the Federal Court is only confined to the issue of there being no proceedings in existence after the order for sale and thus the court had no jurisdiction thereafter to make any order under O. 15 r. 6(2).

**Approach**

Since there are 2 sets of appeals before us, we decided to hear and deal with the first set of appeals involving the question of whether Staghorn can intervene in the proceedings. If we rule in favour of Staghorn then we shall proceed with the second set of appeals. If Staghorn fails, then the second set of appeals should naturally be allowed.

**Is Staghorn Allowed To Intervene In These Proceedings?**

In dealing with an application to intervene in a proceeding under O. 15 r. 6 RHC, Lord Diplock's pronouncement in the *locus classicus* case of *Pegang Mining Co. Ltd. v. Choong Sam & Ors* [1969] 2 MLJ 52 @ 55 is well accepted:

> The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objectives of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for flexibility of approach which makes it desirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all case.

Expanding further on whether a proposed intervener should possess a 'legal interest' to differentiate it from a 'commercial interests' the Privy Council in the same case expressed:

> A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action.

The aforesaid principles were reaffirmed by the Supreme Court in a more recent case of *Arab Malaysian Merchant Bank Berhad v. Dr. Jamaludin bin Dato' Mohd. Jarjis* [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 where Gunn Chit Tuan SCJ remarked:

> One of the class of cases covered by the said rule, which allows intervention by persons not parties, is where the proprietary or pecuniary rights for the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. The ambit of this class has been materially widened by the decision of the U.K. Court of Appeal in *Gurtner v. Circuit* [1968] 1 All ER 328 CA, the effect which is to include any case in which the intervener is directly affected not only to his legal rights but in his pocket.

After perusing the High Court judgment of 30 January 1995, we are of the view that the learned judge in considering this application before him to intervene was firmly in grip of the aforesaid tests. But what is challenged by the plaintiff and the 1st intervener before us is the right of Staghorn to apply for intervention when the order of sale has been granted, the public auction successfully completed, and the Certificate of Sale issued by the High Court. By these, the High Court was *functus officio* in hearing encl. 77.

Before being accused of breaching the order of the Federal Court to entertain this issue, we must, first, distinguish this from that of the decision of this court handed down on 15 June 1995 that consequent in the Federal Court's sanction. Going by the record, the Federal Court reverted these appeals back to us for reason that this court had wrongly decided that encl. 77 or the High Court order in allowing Staghorn to intervene should not be entertained because it was not issued or made at any stage of the proceedings as required by O. 15 r. 6(2) RHC; thus the restriction: "kecuali atas isu bidangkuasa di bawah A. 15 k. 6, Kaedah-Kaedah Mahkamah Tinggi 1980". But this does not prevent this court from dealing with the issue of '*functus officio*' which, according to legal definition, is "A person who has discharged his duty; or whose office or authority has come to an end" – see Mozley & Whiteley's 'Law Dictionary'; it is materially different from the previous ruling of "there being no proceedings in existence".

This concept of *functus officio* is pertinent to this set of appeals in the light of the Supreme Court proposition in *Mui Bank Bhd v. Cheam Kim Yu* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222, which facts are materially similar to the present case. There, Harun Hashim SCJ declares:

> The application to intervene in the present proceedings was not made until a week after the issue of the certificate of sale by which time the auction sale was completed. The learned judge was clearly *functus officio* by then. Indeed, following *Hock Hua Bank Bhd v. Sahari bin Murid*, the learned judge was *functus officio* after he made the order for sale on 29 August 1988. In *Hock Hua* case, the allegation of fraud and forgery were made after the judge had made the order for sale but before the auction sale and the Federal Court held that the judge was *functus officio* after he made the order for sale in foreclosure proceedings when the order had been drawn up and perfected. True, after making an order for sale, the judge has the power to make other orders, including changes in the reserve price and the auction sale dates, but such orders are consequential to the order for sale. The point here is that the order for sale is a final order unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is *functus officio* and therefore has no power to set aside the order for sale.

But it is pertinent to note that in a later Federal Court decision of *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, an exception is made to the rule that a final order regularly obtained cannot be set aside except on appeal. Mohd Azmi FCJ, when delivering one of the judgments in that case described the exception in this fashion:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which *contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction.* It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (emphasis added).

We are of the view that the facts in our instant case fall within the exceptions as pronounced in *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Bhd (supra)*. There was contravention of a substantive statutory provision. The learned judge in the court below is right when he ruled that the mandatory requirement for the creation of the lien holder's caveat was not complied with. It was the 3rd defendant or its solicitors who deposited the document of title of the said land with the plaintiff, and the loan was for the nominee of the

3rd defendant, not the registered proprietors. The registered proprietors (1st & 2nd defendants) did not borrow from the plaintiff and neither did they, or their solicitors, deposited the document of title with the plaintiff. Naturally, when there was a default in the repayment of the said loan, judgment against the borrower was obtained against Park Avenue Homes Sdn Bhd instead of the registered proprietors by the plaintiff. All these contravened the statutory requirements set out in s. 281(1) and (2) NLC which state:

> Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body:
>
> a. may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien-holder's caveat; and
>
> b. shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.
>
> (2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land or lease.

The rational of these requirements are well explained by Whitely JC in the Court of Appeal case of *Palaniappa Chetty v. Dupire Brothers & Anor In the suit Palaniappa Chetty v. Ng Chin Pan* [1922] 1 FMSLR 370:

> The following definition is given in *"Halsbury's Laws of England,"* Vol 19, page 2:
>
> > Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another man until certain demands of the person in possession are satisfied.
>
> Applying this definition to the present case, the appellant had the right to retain grant 5,138 until the loan in respect of which it was deposited was repaid. The right of retention is inconsistent with the exercise by the registered proprietor of his right to deal with the land. The registered proprietor, therefore, has, for the purposes of the lien, surrendered that right. It follows, I think, that he has pledged the land as security for the loan, and has conferred upon the lien-holder a right analogous to that possessed by an equitable mortgagee in countries where such mortgages are recognized.

> That the Registration of Titles Enactment (the forerunner to NLC) recognizes the right to be of that character is, I think, evident from that part of section 80 (similar to section 281 NLC) which provides that a lien holder may enter a caveat. That policy of the Enactment is to restrict the right to enter a caveat to persons who have, or who claim to have, an interest in the land. The conferring of this right upon a lien holder is conclusive evidence to my mind that Legislature intended the debt due by the registered proprietor to the lien holder to be a charge upon the land.

Thus it is material in the creation of a lien holder's caveat under s. 281 NLC to have the registered proprietor to deposit the document of title to the lender for it is the registered proprietor who intends to surrender his rights to the lender to deal with the said land in the event of default in repayment of the loan which he obtained from the lender. As a borrower, no other person can substitute the registered proprietor in performing this task of depositing the document of title with the lender for the creation of this statutory instrument. To allow this would defeat the concept of the right of the registered proprietor to deal with his own land. Section 281 NLC is intended for a registered proprietor to raise money on loan, speedily, by depositing the document of title registered in his name with the lender as compared with the more complex process of registering a legal charge over the land. But as the law demands, it is only available to a registered proprietor who borrows money and deposits his title with the lender. It does not extend to a beneficial owner who is yet to become a registered proprietor. Since this facility is only available to the registered proprietor, in the event of default in repayment of the loan, judgment must be obtained against the registered proprietor, as borrower. The wordings in s. 281(2) NLC of a "holder of any lien has obtained judgment for the amount due to him" is clear to this effect for there can be no one else other than the registered proprietor who is the borrower.

As disclosed, all these provisions were contravened in the creation of the lien holder's caveat and the subsequent remedies resorted. The registered proprietors did not borrow any money from the plaintiff nor did they deposit the document of title with the plaintiff, and neither did the plaintiff obtain judgment on the amount due under the loan against them. When there were non compliance of the rules and procedure in the creation of the lien holder's caveat, and the fulfilment of the pre-condition for enforcement of the remedy subsequent to the failure in repayment of the loan, then the order for sale made in pursuant to s. 281(2) NLC is tainted with illegality.

When the substantive law is breached the court is permitted to depart from the *functus officio* concept laid down in *Mui Bank Bhd v. Cheam Kim Yu (supra)*, and set aside, *ex debito justitiae*, the order for sale under the rule expressed in *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Bhd (supra).*

With these, we find that Staghorn has a right to apply to intervene. We also agree with the finding of the learned judge in allowing Staghorn to intervene since Staghorn is claiming that its rights would be affected by any judgment in the proceeding of this case and that it should not be deprived of a chance to be heard. As advised by the Privy Council in *Pegang Mining (supra)* a "flexibility of approach" must be adopted.

**2nd Set Of Appeals**

As Staghorn can intervene in these proceedings, we shall proceed to consider the other orders of the learned judge dated 27 April 1995.

Though we agree on the invalidity of the lien holder's caveat and the order for sale made thereunder, we are not in agreement with the learned judge in ordering the handing over of the document of title to Staghorn, more so declaring Staghorn as the "rightful true beneficial owner of the said land" and instructing the document of title be registered in its name. In fact the two latter orders are not even requested by Staghorn in its application. There is no dispute that Staghorn paid 10% of the purchase price for the said land but it has nominated the 3rd defendant as the purchaser. All documentary evidence concludes that Staghorn has divested its rights and interest in the said land to the 3rd defendant who, in turn, had secured finances to pay off the balance of the purchase price to the vendors. In the course of this, the land is incumbered. To accede to the demand of Staghorn for the return of the document of title, is, in our view, inequitable and without logic, and to register Staghorn as the registered proprietor far fetched when evidence positively identifies the 3rd defendant as the beneficial owner of the said land that is to be charged to the plaintiff. Though the plaintiff is without the security of a lien holder's caveat, the plaintiff is not without interest over the said land for the loan granted to the 3rd defendant's nominee and registration of a first legal charge over the said land awaits the 3rd defendant to be registered as a proprietor.

As for the 1st intervenes his right to the said land is derived from the order for sale. Now that this order is considered null and void, the sale to him must naturally be annulled and rendered void. He would be entitled to receive back his money paid at the auction.

By these reasons, we find the learned judge has erred in granting some of the orders in favour of Staghorn. To be more precise, we only affirm orders number (i) and (ix) and set-aside orders numbering (ii), (iii), (iv), (v), (vi), (vii), (viii) of the order of the judge dated 27 April 1995. As for the document of title to the said land which is presently in the hands of a stakeholder, M/s K.L. Wong, advocates and solicitors, we order that this is to be delivered to the plaintiff forthwith.

As regards to cost of this appeal, we order that each party bears its own cost.